Supreme Court No. 96985-0
Court of Appeals No. 50366-2-II

Supreme Court
of the State of Washington

State of Washington,

Respondent,

v.

Brian A. Crute,

Petitioner.

Petition for Review

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Table of Contents

Table of Authorities

Cases

Statutes

Rules

1. Identity of Petitioner

Brian Crute, Appellant, asks this Court to accept review of the Court of Appeals decision terminating review, specified below.

2. Court of Appeals Decision

State v. Crute, No. 50366-2-II (Feb. 20, 2019) (unpublished). A copy of the decision is included in the Appendix at pages 1-12.

3. Issues Presented for Review

1. Under *State v. Brown*, 140 Wn.2d 456, 998 P.2d 321 (2000), a defendant can be convicted of assault of an officer without having known that the assault victim was a law enforcement officer. This precedent is both incorrect and harmful. Should this Court overturn *Brown*?

2. Crute was convicted of assault of an officer and obstructing an officer. The officers all testified that Crute was delusional and did not believe they were real officers. Was the evidence insufficient to support the convictions?

3. Expert testimony on the defense of diminished capacity is admissible if it explains the mental defect and how that defect could lead to diminished capacity. Dr. Trowbridge would have explained Crute's mental defect and how it could have led to diminished capacity. Did the trial court abuse its discretion in excluding his testimony?

4. Statement of the Case

Brian Crute was charged and convicted of assaulting a law enforcement officer and obstructing an officer, as the result of a series of unfortunate events on the night of February 28, 2016. Crute suffers from schizophrenia. He has paranoid delusions. That night, he was troubled by delusions and went out for a walk. Someone called 911, and officers were dispatched to do a welfare check.

The officers immediately asserted authority and ordered Crute to stop, to get on his knees, put his hands behind his back, and lay down on the ground, instead of approaching him as helpers and asking how he was or whether he needed assistance. Crute's delusions were exacerbated by the officers' aggressive approach, putting Crute in fear for his life and causing the encounter to spiral out of control, ending with Crute being held to the ground by nine officers and firefighters and being struck with a taser five to seven times within a half-hour period.

Crute's mother said it well at sentencing: "My child, a wellness check, is possibly going to jail for 55 months. It's why African-Americans don't call the police to check on them because they know that it usually ends up with someone in the hospital or going to jail or worse yet, dead." Crute needed mental health assistance. He was not committing any crime before the officers showed up and mishandled the encounter.

4.1 Brian Crute suffers from severe mental illness.

Brian Crute has been diagnosed with schizophrenia. 1 RP 25, 31; 5 RP 398; 6 RP 406. He sees and hears things that are not real. 6 RP 406, 435. He has paranoid delusions that people are secretly conspiring to do him harm. 6 RP 406.

At sentencing, Crute's mother related a brief history of Crute's mental issues. "Brian, at the age of seven or eight, lost his father, his birthfather Conrad Crute. From that point on, he has suffered mental illness. We started out by going to Group Health to get help, but they looked at him just like the prosecutor's looking at him: Well, he doesn't appear to need any help, so after two sessions, they dismissed it and told me I just needed to find a male mentor for him and he would be all right. Well, he wasn't all right." 6 RP 417.

"His mind functions and at times it's very clear and fluid, but other times it's not." 6 RP 418. "You look at him and you want to think, oh, he looks pretty normal. And at times he is very normal. At times he is -- he can go to the genius range with his creativity, if you were able to listen to his music. And it's just like many other people who live in those two worlds. We've had a number of hugely successful people who have lived in the world of mental illness, but yet functioned on occasions. And on other occasions, they're like a child just cuddled up and they can't do anything." 6 RP 418-19.

"So it's a combination. It's not only schizophrenia. It's anxiety. It's bipolar. It's depression. Depressed because I'm this bright smart person and I can't get out and do all of these things. I can write my music, but I don't know how all the steps for producing it. That's who Brian is. … Brian can be successful." 6 RP 419-20. "As you look out, he has the help of many, many in the community; the church, his step-dad, his sister, and all of my friends who are back there, his aunties who are back there, that we're all ready and able to support him." 6 RP 418.

"We all know that jail does not help those who are mentally ill. I'd say if you've ever had someone who is mentally ill can then you understand that you are not cured. It is a life long sentence. And jail exacerbates mental illness; it does not heal it." 6 RP 418.

4.2 Crute was walking in his neighborhood when he was approached by Tacoma Police officers for a welfare check.

Crute was troubled by hallucinations on the night of February 28, 2016. 6 RP 428-29. He went walking through his neighborhood, headed toward McDonalds for some food. 3 RP 272, 296. Someone called 911 to report Crute's activities as suspicious or erratic, and police were dispatched for a welfare check. 2 RP 82, 101, 146-47, 176.

Officers Waddell and Koskovich were the first to contact Crute. 2 RP 102, 148. Waddell exited the patrol vehicle and said, "Hello, Tacoma Police, I need to speak with you." 2 RP 103-04. Crute did not see the patrol vehicle or recognize the officers' uniforms. 3 RP 273. He only saw someone dressed in black telling him to stop. *Id.* He thought that he was being robbed. 3 RP 274. Crute did not speak to the officers, and continued walking. 2 RP 104; 3 RP 273.

Officer Waddell followed, trying to speak with Crute. 2 RP 105. Crute continued walking, shouting back that he did not believe they were police. 2 RP 105. Officer Koskovich activated the patrol vehicle's emergency lights and drove to the other side of Crute. 2 RP 105-06. Officer Koskovich exited the vehicle, identified himself as police, and ordered Crute to get on the ground. 2 RP 150. Crute continued walking and saying they were not police as the officers tried to close in on him from both sides. 2 RP 132, 151, 175.

The officers' focus throughout the encounter was to force Crute to stop so they could detain him. 2 RP 152 ("[O]ur attempt was to get him on the ground so that we could eventually detain him and figure out what's going on."), 175 ("it was attempt to detain him, yes. He was not free to leave."). The officers never asked Crute his name, how he was doing, or if he needed help.

2 RP 174; 3 RP 275-76, 292. They did not tell Crute why they wanted to speak to him. 3 RP 276.

4.3 The officers' aggressive approach combined with Crute's paranoid delusions to place Crute in fear for his life, quickly escalating the "welfare check" into a violent confrontation.

Having been cornered by the officers, Crute searched for an escape route. 2 RP 106. Waddell tried to convince Crute to kneel and place his hands behind his back. *Id.* Crute, still believing the officers were robbers, gave in and complied, thinking that it was just best to let the robbery happen. 3 RP 275. Waddell attempted to place handcuffs on Crute and told him to lay down on the ground. 2 RP 109; 3 RP 275. Crute's deluded mind concluded that his robbers actually planned to shoot him the back of his head. 3 RP 275. He jumped up, freed his hands, and ran away at full speed. 2 RP 109; 3 RP 275.

At this point, the testimony diverged. Crute either ran away and was chased by Koskovich, 2 RP 109-10 (Waddell's testimony), 3 RP 277 (Crute's testimony) or he charged directly at Koskovich, 2 RP 153 (Koskovich's testimony). The officers testified that Crute threw three punches at Koskovich's head, all of which Koskovich was able to duck. 2 RP 110, 153-57. Crute testified that he ran away and put his hands above his head to show he had no weapon. 3 RP 277. Waddell deployed his taser, and Crute fell to the ground. 2 RP 111, 113, 160; 3 RP 277.

Waddell and Koskovich got on top of Crute and attempted to gain control of his arms. 2 RP 113-14. Crute was thrashing his body and kicking, trying to escape. 2 RP 56, 59, 114. Sergeant Jagodinski arrived and attempted to assist the officers to gain control and put Crute in handcuffs. 2 RP 114. Waddell applied the taser a total of four times before the officers succeeded in placing the handcuffs. 2 RP 144-15, 139.

The officers requested medical aid for Crute. 2 RP 65. Crute continued to struggle as the officers waited for the medics to arrive. 2 RP 65. Two more officers, Gutierrez and Haberzettl, arrived. 2 RP 65. The first three officers restrained Crute's torso, while the other two attempted to restrain his legs. 2 RP 66. Crute repeatedly told the officers that there was a bomb underneath him and asked for someone to call the real police. 2 RP 68; 3 RP 199, 232-33, 257, 281-82. Crute felt his life was in danger. 3 RP 285.

Four firefighters/medics arrived and attempted to check Crute's health after the taser strikes. 2 RP 69. Crute resisted any treatment. 2 RP 69. The medics attempted to calm him and obtain consent for treatment, but ultimately concluded that Crute was mentally incompetent to give consent or understand the situation he was in. 3 RP 200-01, 213, 240. For the next 30 minutes or so, Crute struggled wildly as the nine officers and firefighters attempted to keep him restrained while they

transferred him to a gurney and into an ambulance for transport to the hospital. *See* 2 RP 69-75, 120-21, 161. During this process, Officer Jagodinski applied the taser three more times. 2 RP 76-79, 94.

4.4 In a pre-trial motion in limine, the trial court excluded all testimony relating to mental disease or defect.

Prior to trial, the State moved to exclude expert testimony from Dr. Brett Trowbridge on the issue of diminished capacity. 1 RP 24; CP 59. Dr. Trowbridge would have testified that Crute suffers from ongoing mental illness: "schizophrenia not otherwise specified." 1 RP 30. He would have offered testimony explaining the delusions that Crute appeared to be suffering that night. 1 RP 30-31. He would have refuted another expert's opinion that Crute did not have diminished capacity. 1 RP 32.

Dr. Trowbridge's report stated, "At this point I don't have sufficient information to be able to state within reasonable scientific certainty that Mr. Crute's mental illness or intoxication diminished his capacity to form the requisite intent for the crimes charged at the time of the alleged incident, but it seems possible. And it's consistent with Greater Lakes' previous findings. Given that the police themselves felt that he was either on drugs or mentally ill, my opinion a diminished capacity defense is a realistic possibility." 1 RP 32-33.

The trial court excluded Dr. Trowbridge's testimony on the grounds that Dr. Trowbridge's opinion did not state that it was "more probable than not" that Crute's mental illness impaired his ability to form the mental state to commit the crimes charged. 1 RP 38.

The State then moved to exclude any testimony relating to mental disease or defect, because without expert testimony it would only confuse the jury. 1 RP 39. The trial court granted the motion. *Id.*

4.5 Crute was convicted of Assault 3 and Obstructing an officer. The Court of Appeals affirmed.

The jury found Crute guilty of Assault in the Third Degree against Officer Koskovich and of Obstructing a Law Enforcement Officer. CP 95-96. Crute was sentenced to 51 months for the felony Assault and 364 days on the Obstructing misdemeanor. 6 RP 442-43; CP 106, 114. Crute was ordered to undergo mental health and substance abuse evaluations and to comply with all recommended treatment. 6 RP 443; CP 108.

On appeal, Crute argued that the trial court erred in not instructing the jury that for the third degree assault charges the State had to prove that Crute knew that the assault victim was a law enforcement officer who was performing official duties. Br. of App. at 17-18; Reply Br. of App. at 10-13. He argued that the

contrary precedent in *State v. Brown*, 140 Wn.2d 456, 998 P.2d 321 (2000), was both incorrect and harmful and should be overturned. Reply Br. of App. at 10-13. He argued that the State had failed to prove that he knew that the assault victims or the officers he resisted were law enforcement officers performing official duties. Br. of App. at 18; Reply Br. of App. at 14-15.

The Court of Appeals held that it must follow *Brown*, leaving it to this Court to determine whether the precedent should be overruled. *State v. Crute*, slip op. at 9. The court held that the State's evidence was sufficient. *Id.*, slip op. at 10-11.

Crute argued that the trial court abused its discretion in excluding the expert testimony of Dr. Trowbridge. Br. of App. at 11-16; Reply Br. of App. at 2-9. He argued that Dr. Trowbridge's testimony would have been relevant and helpful because it had the tendency to make the ultimate fact of impaired capacity more probable than it would be without the testimony. Br. of App. at 14-15; Reply Br. of App. at 5-6.

The Court of Appeals affirmed exclusion of the testimony, holding that the opinion testimony "did not have a tendency to show more probably than not" that Crute had diminished capacity. *Crute*, slip op. at 7-8.

5. Argument

A petition for review should be accepted when the case involves an issue of substantial public interest that should be determined by this Court, RAP 13.4(b)(4), or when the Court of Appeals decision conflicts with a decision of this Court, RAP 13.4(b)(1).

5.1 The case involves issues of substantial public interest.

Crute would never have been arrested, charged, or convicted were it not for the officers' insensitive treatment of an individual they could tell was mentally impaired, on what was supposed to be a welfare check. This case is typical of incidents of officer overreactions against African-americans that fill the public news media. The public is troubled by these incidents and is seeking solutions.

In 2018, the people of Washington passed Initiative 940, the law enforcement training and community safety act. Laws of 2018, ch. 11, sec. 1. The initiative provides, "The intent of the people in enacting this act is to make our communities safer. This is accomplished by requiring law enforcement officers to obtain violence de-escalation and mental health training, so that officers will have greater skills to resolve conflicts without the use of physical or deadly force." Laws of 2018, ch. 11, sec. 2. Had

the officers here received such training, the result of their encounter with Crute could have been much different.

The outcome could have been different if the legal standards applied at Crute's trial had been different. The statute defining third degree assault of an officer requires that the assault victim be a law enforcement officer engaged in official duties. RCW 9A.36.031(1)(g). But this Court's prior precedent in *Brown* permits a defendant to be convicted even though he didn't know that the assault victim was an officer engaged in official duties. *Brown*, 140 Wn.2d at 467 ("knowledge that the victim was a police officer in the performance of official duties is not an element of the crime of third degree assault"). *Brown* is both incorrect and harmful, raising a misdemeanor to a felony without a more culpable mental state. This Court should overrule *Brown* and require knowledge as an essential element of the crime.

Additionally, the trial court abused its discretion when it excluded expert testimony that met the requirements set forth by this Court in *State v. Atsbeha*, 142 Wn.2d 904, 16 P.3d 626 (2001). There is no question that Crute suffered from mental illness. The officers testified that they thought he was delusional. In order to understand what happened that night, the jury needed to be educated on mental health issues. Without Dr. Trowbridge's testimony, which would have been relevant and

helpful under ER 401, 402, and 702, the jury could not understand or properly evaluate Crute's testimony or his knowledge of whether he was interacting with law enforcement officers engaged in official duties.

These are issues of substantial public importance. This Court should accept review and reverse the convictions, overrule *Brown*, and remand for a new trial with relevant expert testimony and correct jury instructions.

5.1.1 This Court should overrule *State v. Brown*, 140 Wn.2d 456, 998 P.2d 321 (2000), because it is both incorrect and harmful.

In *State v. Brown*, 140 Wn.2d 456, 998 P.2d 321 (2000), this Court held in a 6-3 decision that knowledge that the assault victim is a law enforcement officer is not a required element of assault in the third degree under RCW 9A.36.031(1)(g). *Brown*, 140 Wn.2d at 470. The result of *Brown* is that an ordinary assault can be elevated from a misdemeanor to a class C felony on the fortuitous event that the assault victim happened to be a law enforcement officer, even if the assailant had no knowledge that the victim was an officer. *Brown* makes the status of the victim a strict liability element of the crime. This result is incorrect and harmful and should be overturned.

This Court will overturn prior precedent upon a clear showing that the prior decision is both incorrect and harmful.

State v. Otton, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016). The question is whether the prior decision is so problematic that it must be rejected. *Id.*

Justice Madsen's concurrence in *Brown* demonstrated both the incorrectness and harm in the majority opinion:

> As a result of today's opinion, an assailant who commits an otherwise misdemeanor assault on a person he believes to be his or her compatriot in crime, may nevertheless be convicted of a felony if the victim is per chance an undercover law enforcement officer. From a deterrent and retributive perspective, I believe this is illogical and unjust.

Brown, 140 Wn.2d at 471 (Madsen, J., concurring).

The purpose of the legislature in classifying assault of an officer as assault in the third degree is easily discerned:

> These statutes have a twofold purpose: to reflect the societal gravity associated with assaulting a public officer and, by providing an enhanced deterrent against such assault, to accord to public officers and their functions a protection greater than that which the law of assault otherwise provides to private citizens and their private activities. Consonant with these purposes, the accused's knowledge that his victim had an official status or function is invariably recognized by the States as an essential element of the offense.

Brown, 140 Wn.2d at 471-72 (Madsen, J., concurring).

Without a knowledge requirement, the crime of assaulting an officer cannot further the retributive and deterrent goals of

the criminal law. *Id.* at 473 (Madsen, J., concurring). "I cannot understand why an individual who commits an assault on a person he does not know to be an official is any more blameworthy than one who commits an assault punishable under [a lesser assault statute] and is thus any more deserving of the greater punishment for an offense of a higher class." *Id.* (Madsen, J., concurring).

First, without knowledge of the officer's status, an assailant is no more blameworthy, and therefore a greater level of retribution is not justified and serves no purpose. Second, the statute cannot have any greater deterrent effect on future assaults of officers if it does not distinguish between those who knowingly assault officers and those who believe they are assaulting an ordinary citizen. *Id.* at 474 (Madsen, J., concurring). This is contrary to the legislature's intent to heighten the punishment for attacks against law enforcement and to deter such attacks. *Id.* (Madsen, J., concurring).

The majority decision in *Brown* is incorrect as a matter of statutory interpretation. Assault is an **intentional** touching or striking of another person that is harmful or offensive. *See* WPIC 35.50 and comments thereto. A person acts **with intent** when he acts **with the objective or purpose to accomplish the result** which constitutes the crime. RCW 9A.08.010(1)(a). The **criminal result** described by RCW 9A.36.031(1)(g) is the assault

of a law enforcement officer performing his duties at the time of the assault. A person cannot logically **intend** the **result** of offensively touching or striking an officer unless the person first **knows** that the victim **is** a law enforcement officer performing official duties. The majority decision in *Brown* does not wrestle with the logic, but merely asserts without reasons that knowledge is not required. The majority decision in *Brown* is incorrect.

The majority decision in *Brown* is also harmful as it unjustifiably transforms a misdemeanor assault into a felony, based not on the culpability of the defendant's actions but on a circumstantial fact that was not known to the defendant at the time of the assault. The *Brown* majority's interpretation of the statute should be overruled.

In this case, the State failed to present any evidence that Crute actually knew that Officer Koskovich was a law enforcement officer at the time of the alleged assault. By the officers' own testimony, Crute did not believe they were officers.

The State's evidence was insufficient to prove beyond a reasonable doubt that Crute knew that the officers were discharging official duties at the time. Over the course of Crute's struggles against the officers, Crute told the officers repeatedly that there was a bomb underneath him and that he needed the police to assist him. 2 RP 68; 3 RP 232-33, 257, 263. If Crute

knew the officers were real police discharging official duties, he would not have been asking for other police to come.

Viewing the evidence most favorably to the State, at some point Crute calmed slightly and acknowledged that the officers were the police. 2 RP 68. However, Crute still did not believe that the officers were actually discharging their official duties. He believed they had gone rogue:

> Q. Did you cry out for someone to call the police at any point during this excruciating pain?
>
> A. Later when more, when more police showed, you know. But I was asking for, you know, for him to call some more because **they weren't actually doing their duty** of what I would call, you know, a police officer. So they might have been in uniform, but I'm like, well, you know, some police call some more backup, so we could **get these, you know, these, these, these terrorists, you know, these terrorists with badges away from, you know, away from me, you know, because they weren't doing nothing to -- nothing but causing bodily harm to me.**

3 RP 281-82 (emphasis added). There is no testimony that Crute ever came to understand that the officers were acting as anything other than thugs. The evidence was insufficient to prove beyond a reasonable doubt that Crute knew that the officers were discharging official duties that night. Because the trial court failed to instruct the jury on the required element of knowledge and because the evidence was insufficient to prove this element beyond a reasonable doubt, this Court should

accept review, overrule *Brown*, reverse Crute's convictions, and dismiss the charges.

5.1.2 This Court should reverse the exclusion of Dr. Trowbridge's testimony.

Crute's offer of proof of Dr. Trowbridge's expected testimony sufficiently demonstrated that the testimony was admissible under ER 401, 402, and 702, as articulated in *State v. Atsbeha*, 142 Wn.2d 904, 16 P.3d 626 (2001), *State v. Mitchell*, 102 Wn. App. 21, 997 P.2d 373 (2000), and *State v. Greene*, 139 Wn.2d 64, 984 P.2d 1024 (1999). Each of these cases follows the Evidence Rules, with no change to the standard those rules provide. Under ER 402, "relevant evidence is admissible." ER 402; *Atsbeha*, 142 Wn.2d at 917. Under ER 702, expert opinion testimony is admissible if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." ER 702; *Atsbeha*, 142 Wn.2d at 917. Expert testimony meets this standard if it is relevant. *Atsbeha*, 142 Wn.2d at 917-18; *Greene*, 139 Wn.2d at 73; *Mitchell*, 102 Wn. App. at 27.

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action **more probable or less probable than it would be without the evidence.**" ER 401 (emphasis added); *Atsbeha*, 142 Wn.2d at 917.

The Court of Appeals distinguished Dr. Trowbridge's opinion by saying that "he did not state that Crute was suffering from the disorder *at the time of the offense.* … Under *Atsbeha*, Dr. Trowbridge's opinion did not have a tendency to show more probably than not that Crute's mental disorder impaired his capacity." *Crute*, slip op. at 7-8. The Court of Appeals decision relies on an unfortunate quote from the *Atsbeha* decision that is inconsistent with the standard that the *Atsbeha* court actually declared.

The *Atsbeha* opinion reads, "To satisfy either rule of evidence, [the expert's] testimony must have the tendency to make it **more probable than not** that defendant suffered [diminished capacity]." *Atsbeha*, 142 Wn.2d at 918 (emphasis added). Both the trial court and the Court of Appeals latched onto this "more probable than not" language to heighten the standard above that provided by the evidence rules.

The entirety of the *Atsbeha* opinion makes clear that the admissibility of expert testimony on diminished capacity is governed solely by the Rules of Evidence, not by any judicially constructed supplement. *E.g., Atsbeha*, 142 Wn.2d at 916-17 (rejecting the judicially-constructed *Edmon* factors in favor of ER 401, 402, and 702). Evidence Rule 401 is clear in stating that "evidence having **any tendency** to make the existence of any fact that is of consequence to the determination of the action **more**

probable or less probable **than it would be without the evidence"** is relevant, and therefore admissible. ER 401 (emphasis added). The trial court's role is only to determine whether the expert's testimony makes the ultimate fact of diminished capacity more probable than it would be without the expert's testimony. Determining whether the ultimate fact of diminished capacity has been established under the required standard of proof, "more probable than not," is the exclusive role of the jury.

In requiring Dr. Trowbridge's testimony to demonstrate that diminished capacity was "more probable than not," rather than simply "more probable … than it would be without the evidence," the Court of Appeals decision conflicts with this Court's decision in *Atsbeha*. This Court should accept review and reverse.

6. Conclusion

This case involves issues of substantial public interest. This Court's prior precedent in *Brown* is incorrect and harmful and should be overruled. The Court of Appeals decision conflicts with *Atsbeha*. This Court should accept review and reverse the convictions.

Respectfully submitted this 22nd day of March, 2019.

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7. Appendix

Filed
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Division Two

February 20, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BRIAN ANTHONY CRUTE, Appellant.	No. 50366-2-II UNPUBLISHED OPINION

MAXA, C.J. – Brian Crute appeals his convictions of third degree assault and obstructing a law enforcement officer. The convictions arose out of an incident in which Crute physically resisted when officers attempted to detain him because of his erratic behavior.

We hold that (1) the trial court did not abuse its discretion when it precluded expert testimony regarding Crute's mental illness and his capacity to form the required intent to commit the offenses; (2) the trial court's instruction on third degree assault, which did not require the State to prove that Crute knew that the assault victim was a law enforcement officer, was proper; (3) the State presented sufficient evidence to prove both of his convictions; and (4) Crute's claims asserted in his statement of additional grounds (SAG) have no merit. Accordingly, we affirm Crute's convictions.

FACTS

On February 28, 2016, two Tacoma police officers responded to a call to check on the welfare of a man wandering in a Tacoma neighborhood. The officers were in uniform and in a

marked police car. The officers saw Crute, who was shirtless and sweating profusely, running around in the street and acting erratically.

The officers activated the overhead lights on their police car and attempted to detain Crute to speak with him. Crute physically resisted, including attempting unsuccessfully to punch one of the officers. Ultimately, five uniformed police officers, four firemen, and three taser charges were required to subdue Crute and get him into an ambulance.

The State charged Crute with two counts of third degree assault involving two different officers and one count of obstructing a law enforcement officer.

Before trial, Dr. Phyllis Knopp conducted a forensic evaluation to determine if Crute had the requisite mental state for the charged crimes. She concluded that Crute had the capacity to form the requisite mental state.

Dr. Brett Trowbridge also evaluated Crute. The State filed a motion to exclude Dr. Trowbridge as an expert witness. In argument, both the State and Crute quoted from Dr. Trowbridge's report.[1] Dr. Trowbridge stated, "It appears to me Mr. Crute suffers from schizophrenia and from PTSD." Report of Proceedings (RP) at 25. But he further stated,

> At this point, I don't have sufficient information to be able to state within reasonable scientific certainty that Mr. Crute's mental illness or intoxication diminished his capacity to form the requisite intent for the crimes charged at the time of the alleged incident, but *it seems possible*. And it's consistent with Greater Lakes' previous findings. Given that the police themselves felt that he was either on drugs or mentally ill, [in] my opinion a diminished capacity defense *is a realistic possibility*.

RP at 32-33 (emphasis added).

[1] The report itself is not in the record and the parties provided no other specific information about Dr. Trowbridge's opinions.

The trial court granted the State's motion. Because the trial court excluded Dr. Trowbridge's testimony, the court also granted the State's motion to preclude reference to any mental disease or defect that Crute may have been diagnosed with.

At trial, the officers testified to the facts outlined above. Crute testified that at least at first, he did not know that the people accosting him were police officers. He thought he was being robbed, and thought that he might be shot in the back of the head if he laid down on the ground. Later he stated that the police officers were not doing their job and called them terrorists.

A jury found Crute guilty of one count of third degree assault, acquitted him of the other count of third degree assault, and found him guilty of obstructing a law enforcement officer. Crute appeals his convictions.

ANALYSIS

A. EXPERT WITNESS TESTIMONY

Crute claims that the trial court erred in excluding Dr. Trowbridge's testimony about Crute's mental illness and his capacity to form the required intent to commit the charged offenses because the testimony was relevant and would have been helpful to the jury. We disagree.

1. Legal Principles

Crute claims that Dr. Trowbridge's testimony should have been admitted to support his diminished capacity defense. Admissibility of expert testimony regarding diminished capacity is determined under ER 401, ER 402, and ER 702. *State v. Atsbeha*, 142 Wn.2d 904, 917, 921, 16 P.3d 626 (2001).

ER 702 provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Testimony should be admitted under ER 702 when (1) the witness is qualified as an expert, (2) the expert's opinion is based on a theory generally accepted by the scientific community, and (3) the expert's testimony is helpful to the trier of fact. *State v. Rafay*, 168 Wn. App. 734, 784, 285 P.3d 83 (2012). Testimony is helpful when it concerns issues outside common knowledge of laypersons and is not otherwise misleading. *See id.*

Expert testimony must be relevant to be helpful to the jury. *Atsbeha*, 142 Wn.2d at 917-18, 921. ER 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evidence that is not relevant is inadmissible. ER 402.

We review for abuse of discretion a trial court's decision regarding the admission of expert testimony under ER 702. *State v. Green*, 182 Wn. App. 133, 146, 328 P.3d 988 (2014). An abuse of discretion occurs in this context when no reasonable person would adopt the trial court's ruling. *Atsbeha*, 142 Wn.2d at 913-14.

The Supreme Court in *Atsbeha* established the standard for admissibility of expert testimony regarding diminished capacity. 142 Wn.2d at 914-21. "To maintain a diminished capacity defense, a defendant must produce expert testimony demonstrating that a mental disorder, not amounting to insanity, impaired the defendant's ability to form the culpable mental state to commit the crime charged." *Id.* at 921. Further, to satisfy either ER 401 or ER 702 the expert testimony "must have the tendency to make it more probable than not" that the

defendant's mental disorder impaired his or her ability to form the required mental state. *Id.* at 918.

The court emphasized that to be relevant and therefore helpful to the trier of fact under ER 702, the expert's opinion must show a reasonable relationship between a defendant's mental disorder and his ability to form the mental state charged in the crime. *Id.* at 921.

> It is not enough that a defendant may be diagnosed as suffering from a particular mental disorder. The diagnosis must, under the facts of the case, be capable of forensic application in order to help the trier of fact assess the defendant's mental state at the time of the crime. The opinion concerning a defendant's mental disorder must reasonably relate to impairment of the ability to form the culpable mental state to commit the crime charged.

Id.; *see also State v. Clark*, 187 Wn.2d 641, 651, 389 P.3d 462 (2017) ("diminished capacity requires an expert diagnosis of a mental disorder and expert opinion testimony connecting the mental disorder to the defendant's inability to form a culpable mental state in a particular case").

Crute relies on *State v. Mitchell*, 102 Wn. App. 21, 997 P.2d 373 (2000), which was decided before *Atsbeha* but not mentioned in that case. In *Mitchell*, the defendant was charged with third degree assault after punching a law enforcement officer. *Id.* at 23. The defendant's expert was prepared to testify that he was "100 percent certain" that the defendant suffered from a mental disorder, probably a schizophrenic disorder. *Id.* at 24. In addition, he concluded that the defendant suffered from the severe mental disorder at the time of the incident. *Id.* However, the expert could not say with reasonable certainty that the disorder actually caused the defendant's capacity to be diminished at the time of the incident, only that it was possible. *Id.* at 24, 26. The trial court excluded the testimony. *Id.* at 24.

The appellate court reversed, holding that the expert's testimony was admissible under ER 702 even though the expert could not say whether the defendant's mental disorder was

actually affecting the defendant's capacity at the time of the incident. *Id.* at 27-29. The court stated:

> In a diminished capacity case, the expert's opinion must be helpful to the trier of fact in assessing the defendant's mental state at the time of the crime. An opinion is helpful if it explains how the mental disorder relates to the asserted impairment of capacity. Under this standard, it is not necessary that the expert be able to state an opinion that the mental disorder actually did produce the asserted impairment at the time in question – only that it could have, and if so, how that disorder operates.

Id. at 27 (citations omitted).

The court emphasized that the jury could have considered the expert's testimony and the defendant's behavior at the time of the incident and determined as the ultimate fact finder whether the defendant's capacity was diminished. *Id.*

> The jury, after hearing all the evidence, may find probability where the expert saw only possibility, and may thereby conclude that the defendant's capacity was diminished even if the expert did not so conclude.

Id. at 28.

Mitchell has not been overruled or found to be inconsistent with *Atsbeha*. The State does not argue on appeal that this court should disregard *Mitchell*.

2. Analysis

Mitchell holds that expert testimony regarding diminished capacity can be admissible even if the expert cannot state with reasonable certainty that the defendant's mental disorder actually impaired his or her capacity at the time of the offense. 102 Wn. App. at 27-29. The expert need only state that the mental disorder "could have" produced the asserted impairment at the time of the offense.

The court in *Atsbeha* did not expressly hold that an expert must state any opinion regarding diminished capacity on a more probable than not basis for the expert's opinion to be admissible, and therefore *Atsbeha* is not necessarily inconsistent with *Mitchell*. But the court in

Atsbeha did state that the expert's opinion must have a "tendency" to show more probably than not that the defendant's mental disorder impaired his or her capacity to form the required mental state to commit the charged offense. 142 Wn.2d at 918. The expert's opinion must reasonably relate the defendant's mental disorder to the impairment of his or her ability to form a culpable mental state. *Id.* at 918, 921.

Crute argues that the facts here are almost identical to the facts in *Mitchell*, and therefore under *Mitchell* the trial court should have admitted Dr. Trowbridge's testimony. However, there is one significant difference between the expert's opinion in *Mitchell* and Dr. Trowbridge's opinion. In *Mitchell*, the expert would have testified with reasonable certainty that the defendant had a mental disorder and that *he suffered from the disorder at the time of the offense*. 102 Wn. App. at 24, 28. Applying the *Atsbeha* standard, this testimony reasonably related the mental disorder to the defendant's capacity to form the required mental state to commit the charged offense.

But the limited portion of Dr. Trowbridge's report that is in the record is not sufficient to meet the *Atsbeha* standard. Dr. Trowbridge's proposed testimony was that Crute had a mental disorder, but he did not state that Crute was suffering from the disorder *at the time of the offense*. As a result, Dr. Trowbridge's testimony provided no direct connection between the mental disorder and any diminished capacity. Instead, Dr. Trowbridge stated that he did not have sufficient information to make that connection.

Our standard of review is abuse of discretion. *Green*, 182 Wn. App. at 146. Because Dr. Trowbridge did not give an opinion that Crute suffered from a mental disorder at the time of the incident with the officers, we cannot say that the trial court abused its discretion in excluding the expert testimony. Under *Atsbeha*, Dr. Trowbridge's opinion did not have a tendency to show

more probably than not that Crute's mental disorder impaired his capacity to form the required mental state to commit the charged offenses. *See* 142 Wn.2d at 918.

We hold that the trial court did not abuse its discretion in excluding Dr. Trowbridge's expert testimony.

B. JURY INSTRUCTION ON THIRD DEGREE ASSAULT

Crute argues that the trial court erred in not instructing the jury that for the third degree assault charges, the State needed to prove that he knew that his victim was a law enforcement officer. We disagree.

1. Legal Principles

In general, we review a trial court's choice of jury instructions for an abuse of discretion. *State v. Hathaway*, 161 Wn. App. 634, 647, 251 P.3d 253 (2011). However, we review de novo the refusal to give an instruction based on a ruling of law. *State v. Cordero*, 170 Wn. App. 351, 369, 284 P.3d 773 (2012).

Jury instructions are appropriate if they allow a defendant to argue his or her theories of the case, are not misleading, and when read as a whole properly state the applicable law. *State v. Aguirre*, 168 Wn.2d 350, 363-64, 229 P.3d 669 (2010). It is not error to refuse to give a specific instruction when a more general instruction adequately explains the law and allows each party to argue its theories of the case. *Hathaway*, 161 Wn. App. at 647.

2. Analysis

Under RCW 9A.36.031(1)(g), a person is guilty of third degree assault when he or she "[a]ssaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault." The trial court's instruction

mirrored this statute. The applicable to convict instructions did not require the State to prove that Crute knew the alleged victim was a law enforcement officer.

Crute argues the court's instruction was erroneous because an essential element of third degree assault is that the defendant knew that the victim was a law enforcement officer. However, in *State v. Brown*, the Supreme Court specifically held that under the plain statutory language, the knowledge that the person assaulted is a police officer is not an element of RCW 9A.36.031(1)(g). 140 Wn.2d 456, 466-68, 998 P.2d 321 (2000).

Crute argues that the court's holding in *Brown* is incorrect and that *Brown* should be overruled. But we are bound to follow Supreme Court precedent. *State v. Winborne*, 4 Wn. App. 2d 147, 175, 420 P.3d 707 (2018). We apply *Brown* as controlling authority.

We hold that the trial court did not err in instructing the jury of the elements of third degree assault.

C. SUFFICIENCY OF THE EVIDENCE

Crute claims that the State failed to present sufficient evidence to support his convictions because it failed to prove that he knew the persons he was resisting were law enforcement officers. We disagree.

1. Standard of Review

The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). In a sufficiency of the evidence claim, the defendant admits the truth of the State's evidence and all reasonable inferences drawn from that evidence. *Id.* at 106. Credibility determinations are made

by the trier of fact and are not subject to review. *State v. Miller*, 179 Wn. App. 91, 105, 316 P.3d 1143 (2014). Circumstantial and direct evidence are equally reliable. *Id.*

2. Analysis

a. Third Degree Assault

Crute argues that the evidence was insufficient to prove that he knew the persons he allegedly assaulted were law enforcement officers. But as discussed above, knowledge that the assault victim is a law enforcement officer is not an element of third degree assault. Therefore, we reject this argument.

b. Obstructing a Law Enforcement Officer

Under RCW 9A.76.020(1), a person is guilty of obstructing a law enforcement officer "if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties." The trial court instructed the jury that the State had to prove that (1) "the defendant willfully hindered, delayed, or obstructed a law enforcement officer in the discharge of the law enforcement officer's official powers or duties," and (2) "the defendant knew that the law enforcement officer was discharging official duties at the time." Clerk's Papers at 89.

Crute argues that the State failed to prove that he knew he was obstructing law enforcement officers because he repeatedly asked for the police to come. At trial, Crute suggested that he thought the officers were not acting in their official capacities, characterizing them as terrorists.

But the State presented sufficient evidence for a jury to find that Crute knew he was obstructing law enforcement officers performing their official duties. First, all five officers were in uniforms identifying them as police officers. Second, the first officers to arrive activated the

fully marked police car's overhead lights, identified themselves as police officers, and asked to speak with Crute. And third, the officers informed Crute numerous times that they were police officers. This evidence was sufficient for a rational jury to infer that Crute knew he was dealing with law enforcement officers.

We hold that the State presented sufficient evidence to convict Crute of obstructing a law enforcement officer.

D. SAG CLAIMS

In his SAG, Crute makes three assertions. First, he asserts that the trial court should have admitted a 911 recording identifying him because the description was inaccurate. This argument is beyond our scope of review because this argument was not made at trial, and the 911 call is not part of the record on appeal. We may consider only facts contained in the record. *State v. Estes*, 188 Wn.2d 450, 467, 395 P.3d 1045 (2017).

Second, Crute asserts that his arrest was illegal because it was supposed to be a welfare check, not a high-risk felony stop of a pedestrian who did not fit the description given by the 911 caller. Again, no such challenge was raised at trial and it relies in part on evidence outside the record. Therefore, we cannot review it.

Third, Crute asserts that neither the prosecutor nor the trial court read him his patient hospital rights, the prosecutor accused him of using PCP (phencyclidine) without the drug appearing in his urinalysis, and the prosecutor improperly argued against a drug offender sentencing alternative (DOSA). To the extent we characterize this as a claim of prosecutorial misconduct, we find no merit to the claim because Crute waived any such claims by not objecting at trial and he fails to show that any alleged error was so flagrant and ill-intentioned

that it could not have been cured with a proper instruction. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012).

To the extent Crute is claiming that he should have received a DOSA, the trial court found that he was ineligible and instead ordered that the Department of Corrections make drug and mental health evaluations and treatment part of his community custody. The trial court did not abuse its discretion in failing to give Crute a DOSA. *See State v. Hender*, 180 Wn. App. 895, 900, 324 P.3d 780 (2014) (DOSA not reviewable). Further, it appears that Crute was ineligible for a DOSA because he had a previous DOSA in 2010. *See* RCW 9.94A.660(1)(g)[2].

CONCLUSION

We affirm Crute's convictions of third degree assault and obstructing a law enforcement officer.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Maxa, C.J.

MAXA, C.J.

We concur:

Johanson, J.

JOHANSON, J.

Lee, J.

LEE, J.

[2] RCW 9.94A.660(1)(g) was amended in 2016. LAWS OF 2016, Spec. Sess., ch. 29, § 524. Because those amendments do not affect our analysis, we cite to the current version of the statute.

Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on March 22, 2019, I caused the foregoing document to be filed with the Court and served on counsel listed below by way of the Washington State Appellate Courts' Portal.

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